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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Australia --

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This document reproduces a written contribution from Australia submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- AUSTRALIA --

1. Summary of submission

1. In many cases, remedies are useful to allow the efficiencies of mergers to be realised, while addressing competition concerns. However, there are always limitations associated with remedies, and in some cases these limitations may be insurmountable. These issues are explored in greater detail in this paper.

2. When considering a potential remedy, the Australian Competition and Consumer Commission (ACCC) will primarily consider the strength of its competition concerns with the proposed acquisition, and how well the remedy addresses those concerns. In most cases, the ACCC tests proposed remedies with market participants to assist in that assessment and the remedies usually go through multiple iterations before a final version is settled.

3. In cases where a remedy clearly addresses the ACCC's competition concerns and is likely to be enforceable, the ACCC is more likely to accept the remedy. The stronger the concerns, the greater the degree to which the ACCC will need to be satisfied that the remedy addresses those concerns, and that it can be effectively implemented. Where a proposed acquisition would have a particularly grievous impact on competition, it may be the case that there is no acceptable remedy that can address the ACCC's competition concerns.

4. Similarly, a proposed remedy may be too complex to be effectively implemented and as such incapable of being a sufficient resolution of the ACCC's competition concerns.

5. These issues are illustrated by the examples described in this submission. In particular, in its review of Sea Swift's proposed acquisition of Toll Marine Logistics, the ACCC decided to oppose the acquisition, which included a decision not to accept remedies offered by the merger parties. This was because the behavioural remedies offered would not have resolved the ACCC's competition concerns and were difficult to monitor and enforce.

6. After the ACCC opposed the acquisition, Sea Swift sought authorisation from the Australian Competition Tribunal (Tribunal) for the acquisition. The Tribunal granted Sea Swift conditional authorisation. In its decision, the Tribunal accepted the conditions of authorisation as offered by Sea Swift. It accepted the potential benefits put forward by the applicant and did not accept the identified shortcomings. While the Tribunal applies a different statutory test to that applied by the ACCC (net public benefit versus substantial lessening of competition), this was still a disappointing outcome. For this reason, the ACCC is considering how it might more effectively articulate its concerns about merger remedies in future Tribunal cases.

7. The submission also outlines challenges relating to the appropriate role of merger remedies where governments privatise monopoly assets. In these circumstances, if the purchaser holds an interest in a business at other levels of the supply chain, merger remedies may be able to deal with infrastructure access issues (albeit in a way that is inferior to properly considered access regulation). However, the ACCC has recently commented publicly on the fact that merger remedies cannot address competition issues arising from the monopoly characteristics of the infrastructure that exist regardless of ownership.

2. Background

8. The test applied by the ACCC is whether a merger would contravene section 50 of the Competition & Consumer Act 2010 (Cth) (the Act). Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.

9. Under the most commonly used merger control process in Australia (the 'informal review' process), the ACCC does not make binding decisions about mergers. Instead, at the end of its review, the ACCC provides merger parties with its view as to whether a proposed acquisition would contravene s. 50 of the Act. Parties rely on that view to determine whether to proceed with the proposed acquisition.

10. If at the conclusion of an informal review the ACCC forms the view that a merger proposal would be likely to substantially lessen competition (and that any offered remedies would be insufficient to address the competition issues), and the parties nonetheless decide they wish to proceed with the acquisition:

- The ACCC must decide whether to apply to the Federal Court of Australia for an injunction to prevent the merger from proceeding or for an order of divestiture if the acquisition has already completed and other orders, such as a declaration that the acquisition is void (which requires the vendor to refund the monies paid) and penalties. In this case, the onus would be on the ACCC to establish that the acquisition contravened s. 50 of the Act.

- The parties may seek a declaration from the Federal Court that a merger would not contravene s. 50 of the Act.

- The parties may apply to the Tribunal for merger authorisation. In this case the Tribunal must be satisfied that the merger would result in essence in a net public benefit.

11. Our answers to the specific questions posed are set out below.

3. Please provide a short description of i) mergers that your agency has prohibited in the last five years, detailing reasons, as well as whether remedies were offered and not accepted and the reasons for this and ii) a few important mergers your agency has cleared subject to remedies in the last five years.

12. Set out below are four recent example of mergers that the ACCC has considered that have involved remedies:

- An acquisition where the ACCC was offered a remedy but took the view that the competition concerns, when taken into account with the remedies, were such that the acquisition should be prohibited.

- A proposed acquisition about which the ACCC held strong concerns, that was subsequently abandoned by the proposed purchaser after the ACCC indicated that the proposed remedies were unlikely to address the concerns and would be incapable of being enforced.

- A completed acquisition in which the ACCC decided to accept a divestment remedy from the parties to remedy its competition concerns.

- A proposed acquisition that was cleared subject to remedies which effectively removed the competitive overlap between the parties.

13. In addition to these examples, there have been other cases in which parties have offered remedies to the ACCC that the ACCC declined to accept, but many of these cases cannot be raised in this paper for reasons that the remedies were proposed on a confidential basis.

3.1 Acquisition opposed by the ACCC: Sea Swift's proposed acquisition of Toll Marine Logistics (2015)

14. Key points:

- The ACCC considered the acquisition to be a merger of the only two significant participants in markets with significant barriers to entry or expansion.

- The parties offered behavioural remedies: guarantees of minimum levels of service and a price cap for marine freight services to remote communities, a commitment not to enforce contract exclusivity, and open access to an important piece of local infrastructure.

- The ACCC considered the remedies insufficient to address its competition concerns, and opposed the acquisition.

- Sea Swift subsequently applied to the Tribunal for authorisation of the proposed acquisition on the basis that it would result in a net public benefit. The Tribunal found the proposed acquisition was unlikely to result in competitive detriment and the proposed remedies would likely result in public benefits.

15. On 9 July 2015 the ACCC announced that it had decided to oppose Sea Swift Pty Ltd's (**Sea Swift**) proposed acquisition of assets associated with the Toll Marine Logistics business (**Toll Marine**) in the Northern Territory and far north Queensland.

16. Prior to 2013, Sea Swift was the dominant supplier of marine freight services in far north Queensland and Toll Marine was dominant in the Northern Territory. In 2013, Sea Swift entered the Northern Territory market and Toll Marine responded by expanding in far north Queensland. A price war ensued, with both firms incurring losses.

17. Toll Marine and Sea Swift were each other's closest competitor and, on many routes, there were no other suppliers of scheduled freight services. Further, some of these communities serviced by Sea Swift and Toll Marine could not receive freight by road either at all (e.g. island communities) or during the wet season when many roads are impassable.

18. Toll Marine did not submit that it was a failing firm, but the ACCC accepted that, if the proposed acquisition did not proceed, Toll Marine would be likely to wind-up its marine freight operations in the Northern Territory and far north Queensland. The parties submitted that, in these circumstances, there would be no difference between the future with the proposed acquisition and the future without it. However, the ACCC considered that the proposed acquisition was substantially less competitive than likely alternative options:

- Toll Marine selling its business as a going concern to a third party, or

- Toll Marine exiting the market, thereby presenting a unique opportunity to lower barriers to entry or expansion for Sea Swift's competitors by making Toll Marine's major customer contracts contestable at the same time, not in the usual staggered way, so that the factor of incumbency was reduced.

19. During the course of the ACCC's review, Sea Swift attempted to alleviate the ACCC's competition concerns by offering a remedy. The proposed remedy included:

- Commitments to provide third party access to port facilities at Gove in the Northern Territory (the **Gove Wharf**) that Sea Swift would acquire from Toll Marine as part of the proposed acquisition, including price and non-price terms of access. This remedy attempted to address ACCC concerns that access to the Gove Wharf was a barrier to new entrants offering services in the Northern Territory.

- Commitments from Toll Marine to ensure certain vessels were available to the market.

- A commitment not to give effect (or threaten to give effect) to any exclusivity or minimum volume requirements in the customer contracts that Sea Swift would acquire from Toll Marine.

- Commitments to maintain service levels and not to increase prices outside specified parameters on certain routes.

20. The ACCC decided not to accept these proposed remedies as it considered that they would not remedy the competitive harm that was likely to result from the proposed acquisition. This was for a number of reasons, including:

- The proposed remedies did not address the loss of competition faced by Sea Swift associated with the proposed acquisition.

- The proposed remedies did not address key barriers to entry and expansion faced by potential competitors, such as economies of scale and scope and reputational concerns of customers.

- Behavioural commitments to maintain service levels and not to increase prices outside of service parameters would result in inferior outcomes compared to a competitive market outcome.

- The obligations in the remedies were drafted in broad terms, and included various exemptions. The ACCC considered that the drafting of the provisions may have allowed Sea Swift scope to avoid aspects of its obligations under the remedies, while technically complying with their terms.

- The proposed remedies did not provide for independent auditing of compliance.

21. For these reasons the ACCC decided that it could not accept the proposed remedies and therefore decided to oppose the proposed acquisition on 9 July 2015.

22. Sea Swift subsequently applied to the Tribunal for authorisation of the proposed acquisition on 4 April 2016. Authorisation is a different test to a section 50 test as it incorporates a public benefit element. The Tribunal took a different view to the ACCC on the competition issues, and its assessment of Sea Swift's application is considered later in this paper at paragraphs 0 to 0.

3.2 Acquisition abandoned after ACCC expressed concerns: Brookfield consortium – proposed acquisition of Asciano (2015)

23. Key points:

- Proposed acquisition would have resulted in the vertical integration of a freight haulage business with two different pieces of infrastructure in different parts of the country; a rail network in Western Australia, and a coal export terminal in Queensland.

- The parties proposed long-term behavioural remedies to address the ACCC's concerns about the potential for discriminatory conduct.

- ACCC decided not to accept the proposed remedies as it considered they were incapable of being enforced and would not address its competition concerns.

- The parties subsequently abandoned this deal, and entered into a revised commercial arrangement that split the assets in a way that did not raise concerns that would give rise to a substantial lessening of competition.

24. In August 2015 the ACCC commenced a review of a proposed acquisition by a Brookfield Infrastructure Partners-led consortium (**Brookfield**) to acquire Asciano Limited (**Asciano**). Following the proposed acquisition, Brookfield would own Asciano's Pacific National above rail business. Pacific National operates on Brookfield's rail network in Western Australia and transports coal to Brookfield's Dalrymple Bay Coal Terminal (**DBCT**) (a multi-user coal export facility in Queensland owned by the Queensland government but leased to Brookfield under a long term lease).

3.2.1 ACCC's competition concerns

3.2.1.1 Issue 1 (in Western Australia):

25. The ACCC was concerned that the vertical integration of Brookfield's below rail network (i.e. ownership of an extensive network of rail tracks) with Asciano's Pacific National above rail business (i.e. ownership of locomotives and wagons and provision of freight haulage services) would lead to a substantial lessening of competition in the following markets:

- the supply of freight haulage services between Western Australia and Australia's central and eastern states

- the supply of intrastate haulage services for bulk freight within Western Australia (grain and minerals).

26. The ACCC was concerned that Brookfield would have the ability and incentive to foreclose Pacific National's above rail competitors that use Brookfield rail and would have access to sensitive commercial information of those competitors.

3.2.1.2 Issue 2 (in Queensland):

27. The ACCC was concerned that the vertical integration of DBCT with Pacific National's above rail business would lead to a substantial lessening of competition in the relevant markets in which above rail service providers competed to haul coal to DBCT by:

- giving Brookfield the ability and incentive to discriminate in favour of Pacific National's above rail haulage services using DBCT
- giving Brookfield the ability and incentive to increase costs for competitors of Pacific National in the provision of above rail haulage services using DBCT
- giving Brookfield access to competitively sensitive information that it could use to the benefit of Pacific National, and/or
- raising barriers to entry for above rail competitors of Pacific National using DBCT.

3.2.2 The proposed remedies

28. Brookfield proposed two remedies to address the ACCC's competition concerns in Western Australia and Queensland.

3.2.2.1 Western Australia remedy:

29. The Western Australia remedy sought to build upon but largely rely on existing obligations Brookfield had to comply with pursuant to an access regime which was administered by a state-based regulator in Western Australia. This included obligations relating to non-discrimination, ring-fencing of confidential information, dispute resolution processes and limits on access charges. In addition, the proposed remedy:

- provided the ACCC with some supervisory powers and review mechanisms which largely duplicated Brookfield's existing obligations under the State regime
- provided for two price constraint mechanisms
- included a requirement that Brookfield submit an "access undertaking" under Part IIIA of the Act, which would apply to certain of its freight services in certain circumstances. An access undertaking under Part IIIA of the Act is different to a remedy considered in a mergers context – access undertakings are legal regimes that facilitate third party access to significant infrastructure facilities.

3.2.2.2 Queensland remedy:

30. Similar to the Western Australia remedy, the Queensland remedy sought to build upon and rely on Brookfield's obligations to the State regulator in Queensland. In particular the Queensland remedy provided for:

- non-discrimination and non-disclosure requirements
- independence requirements in relation to the role of the operator of DBCT
- complaint handling requirements
- confidentiality requirements
- a requirement on Brookfield not to bundle port and rail capacity
- a requirement on Brookfield to maintain the contractual arrangements that applied at DBCT on substantially the same terms as existed prior to the acquisition.

3.2.3 ACCC decision not to accept the proposed remedies

31. On 26 November 2015 the ACCC announced that it would not accept Brookfield's proposed remedies as it considered they were incapable of being enforced and would not adequately address the ACCC's competition concerns.

32. The ACCC will only consult on proposed remedies if it considers that the remedies are capable of being enforced and have the potential to adequately address competition concerns arising from the acquisition. The ACCC considered that the proposed remedies offered by Brookfield did not meet these criteria.

33. One of the central concerns underpinning the ACCC's decision was that the long term behavioural remedies were unlikely to be capable of addressing the scale and complexity of vertical integration arising from combining Brookfield's monopoly infrastructure assets with Pacific National's above rail operations. In effect, the merger parties were seeking to create a vertically integrated market structure which would then be regulated via a behavioural remedy (with its inherent shortcomings). In addition, the ACCC took into account:

- strong concerns raised by market participants about the ability of the behavioural obligations to adequately address the competition concerns for the duration of the commitments
- the difficulty and risks of behavioural remedy obligations that are clear, comprehensive and rigorous enough to address the competition issues arising from this scale of vertical integration, but that could be flexible enough to allow Brookfield to engage in legitimate operational activities
- that the proposed remedies relied in part on state-based access regimes, which are subject to change and, in some cases, had been criticised for their lack of effectiveness in dealing with key issues such as vertical integration.

3.2.4 Revised transaction

34. Following the ACCC's decision to reject the proposed remedies, Brookfield provided the ACCC with a revised set of proposed remedies. However, before a final decision was reached about the proposed acquisition (and the revised remedies), Brookfield entered into a new consortium which proposed to acquire Asciano. The new consortium structured its proposed acquisition to address the ACCC's competition concerns in relation to Brookfield's proposal such that a remedy was not necessary.

3.3 Divestment remedy accepted to unwind a completed acquisition: Primary Healthcare's acquisition of Healthscope pathology centres (2016)

35. Key points:

- Parties completed an acquisition without notifying the ACCC in circumstances where the parties were aware that the ACCC would scrutinise the acquisition.
- Failure to notify the ACCC is not an offence, but the ACCC can investigate completed acquisitions and seek court orders (including divestiture and penalties).
- The acquisition reduced the number of pathology service providers in Queensland from three to two. The ACCC held significant concerns about the competitive impact of this change.
- After investigation, the parties offered and the ACCC decided to accept a divestiture remedy that largely reversed the acquisition.

36. On 2 February 2015 Primary Health Care Limited (**Primary**) acquired the Queensland pathology business of Healthscope Limited (**Healthscope**). The parties were aware that the ACCC would have an interest in any major acquisition in the pathology sector.

37. The ACCC was not notified of the acquisition in advance of its completion. The ACCC became aware of the acquisition shortly after this date as a result of complaints from market participants and commenced an investigation immediately.

38. While there is no legal obligation to obtain ACCC clearance before completion of a transaction, parties that complete an acquisition without obtaining formal or informal ACCC clearance are subject to the risk that the ACCC will subsequently seek court orders relating to the acquisition that include divestiture of the acquired business and/or penalties.

39. The ACCC had strong concerns about the competitive effects of the acquisition. It removed a significant third provider of pathology services in Queensland, leaving just two major full-service pathology providers in that state. The ACCC considered that this change in market structure would be likely to result in increased prices and reduced service levels for pathology services in Queensland.

40. On 15 June 2016, the ACCC accepted divestment remedies from the parties that largely reversed the acquisition. The ACCC decided to accept the remedy rather than continue investigating the matter and potentially commencing court proceedings. There was a trade-off involved in this decision. The ACCC gave up the opportunity to seek, amongst other remedies, potentially greater divestments, penalties as well as a declaration that the transaction was void and the requirement to refund monies. However, litigation would likely have been costly and protracted. In accepting a divestment remedy, the ACCC acted in a way that was likely to restore a competitive market structure in the supply of pathology services in Queensland as expeditiously as possible and lessen the risk of deterioration of the divestiture assets pending the outcome of a lengthy court case.

3.4 Acquisition cleared subject to a remedy: Iron Mountain's proposed acquisition of Recall (2016)

41. Key points:

- ACCC concerned about the proposed merger of the two largest, and closest competing, suppliers of physical document management services in Australia.
- ACCC considered a partial divestiture remedy to be insufficient to address its concerns.
- ACCC ultimately accepted a remedy that involved the divestiture by Iron Mountain of almost all of its existing physical document management business in Australia.

42. On 31 March 2016, the ACCC announced its decision not to oppose the proposed acquisition of Recall Holdings Limited (**Recall**) by Iron Mountain Incorporated (**Iron Mountain**) subject to an enforceable divestment remedy. The proposed acquisition was a global merger between two leading suppliers of information management services and was considered by competition authorities in Australia, the United States of America, Canada and the United Kingdom.

43. The ACCC primarily considered the competitive effects of the proposed acquisition in markets for the supply of physical document management services (**PDMS**). The supply of PDMS encompasses the storage of boxes or files and the activities associated with the stored boxes or files such as transport, cataloguing, retrieval and destruction.

44. Iron Mountain and Recall were the two largest, and closest competing, suppliers of PDMS in Australia.

45. During the course of its review, the ACCC considered whether a partial divestment remedy proposed by the merger parties would have satisfied its competition concerns. In deciding that it would not have satisfied its concerns, the ACCC took into account that:

i) A divestment of something less than a complete business raises questions about the effectiveness of a remedy; the ACCC needs to be satisfied that the divestiture business would be a strong competitor following the divestiture.

ii) If the remedy would have involved a selection of facilities and customer contracts sourced from both Iron Mountain and Recall (a 'mix and match' remedy), this would have heightened the concern outlined at (i). This is because the ACCC would have had less confidence that a package of customers and assets from multiple businesses would have been capable of being operated as a single integrated business.

iii) A partial divestment of customer contracts raises a concern about how the customers that are to be divested are chosen. The ACCC had concerns about the ability of a new competitor to compete effectively with Iron Mountain in the future if its starting customer base had been chosen by Iron Mountain.

iv) The success of the divestment would have been dependent on third parties – there was potential for the divestment to have been disrupted or even prevented entirely if relevant customers and landlords had not consented to the transfer of their business/custom to the purchaser of the divestment assets.

v) A partial divestment would have been logistically challenging. Because the customers to be divested would not have had all of their boxes stored in the facilities to be divested, a partial divestment would have involved the movement of significant numbers of boxes within Iron Mountain and Recall's own facilities before the relevant facilities could be divested to a proposed purchaser. This process would have taken a significant amount of time and accordingly would have required an extended period for the divestiture to be completed.

46. These concerns were raised with the merger parties. Ultimately Iron Mountain agreed to divest almost all of its Australian business in order to address the ACCC's competition concerns. This was done by means of a sale of its subsidiary, Iron Mountain Australia Pty Ltd, to a purchaser approved by the ACCC. The only parts of its Australian business that Iron Mountain retained related to services in which there was either no competitive overlap with Recall in Australia, or in which the competitive overlap did not raise significant concerns.

47. In accepting the remedy, the ACCC decided that the divested business would likely be an effective independent competitor to Iron Mountain and other PDMS suppliers. In effect, the divestiture would have the effect of unwinding the proposed acquisition in the markets of concern in Australia.

4. Is your practice regarding prohibitions and remedies reflected in 'best practice' documents or in other guidelines? If yes, please describe the main factors/circumstances to be considered according to your soft law document. If not, are you planning to issue guidance in the near future?

48. The ACCC has published two sets of guidelines to explain its standard analytical and procedural approaches to merger assessments under its informal clearance process, including its approach to remedies. These documents are the ACCC's:

- Merger Guidelines[1]
- Informal Merger Review Process Guidelines.[2]

49. The Merger Guidelines outline the analytical and evaluative framework applied by the ACCC when reviewing mergers under section 50 of the *Competition & Consumer Act 2010*. It provides guidance on the factors the ACCC considers relevant to its consideration of mergers and includes discussion of the ACCC's analytical approach to accepting enforceable undertakings as a remedy to merger-related competition concerns. These factors are discussed in detail in the next section of this paper.

50. The Informal Merger Review Process Guidelines explain the typical process that the ACCC will follow when conducting a merger review under its non-statutory process. It includes an outline of the process by which the ACCC will consider proposed remedies.

51. For mergers that are not able to be cleared following a Phase I review, the ACCC will publish a Statement of Issues which outlines its preliminary views on competition issues arising from the proposed acquisition and identifies areas of further inquiry. The preliminary views are divided into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'. This provides the merger parties and the public an indication of the level of concern that the ACCC has identified at a preliminary level.

52. In addition, the ACCC also maintains a 'standard form' undertaking. This document reflects the ACCC's standard clauses for a divestment remedy, and is continually reviewed and updated in light of the ACCC's accumulated experience in drafting remedies. The ACCC encourages merger parties to treat this document as a starting point for divestment remedies. If the particular circumstances of a merger require a departure from the standard terms, the ACCC encourages parties to make this clear and discuss the reasons for those changes with the ACCC up front.

53. The ACCC does not publish this document on its website. Instead, if merger parties inform the ACCC that they are considering a remedy, the ACCC will provide the parties with a copy of the current version of the document.

5. What challenges have arisen in the design of remedies? How do you decide which remedy, or combination of remedies, is unable to cure the competition harm? Which remedies have not worked in practice or not worked as effectively as anticipated?

54. This paper first sets out the ACCC's criteria for considering a remedy. Then, in light of those criteria, it sets out some of the challenges that have arisen in the design and implementation of remedies. It first considers the specific challenges raised by divestment and behavioural remedies, and then explains some other broader challenges that have been faced by the ACCC.

1 http://www.accc.gov.au/publications/merger-guidelines.

2 http://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013.

5.1 When the ACCC will accept a merger remedy

55. The ACCC will not accept a remedy that has been offered by a merger party unless its core obligations (for example, a divestiture) specifically, comprehensively and effectively address the competition issues raised by the merger. The relevant question is whether the proposed acquisition, in conjunction with the offered remedy, would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

56. That means the ACCC does not trade-off or weigh different pro-competitive or anti-competitive elements associated with an acquisition when assessing a proposed remedy. Rather, it considers whether the likely anti-competitive effects of a merger are mitigated by a remedy to such an extent that they are no longer substantial in any of the affected markets. The stronger the ACCC's competition concerns, the greater the degree to which it will need to be satisfied that the remedy addresses those concerns, and that it can be effectively implemented. Where the ACCC considers that a proposed acquisition would have a particularly grievous impact on competition, it may be the case that there is no acceptable remedy that can address the competition concerns.

57. Similarly, the ACCC may take the view that a proposed remedy is too complicated to be workable. While every circumstance is considered on its own merits, the ACCC has less confidence in the effectiveness of remedies that use complex mechanisms in an attempt to address competition concerns.

58. In deciding which remedies are capable of adequately addressing the competition harm, the ACCC has certain starting positions, based on its experience and international best practice, such as:

- a preference for structural remedies over behavioural remedies in most cases
- a particular scepticism about behavioural remedies that merely attempt to control final market outcomes (e.g. price control remedies), without addressing underlying competition issues
- a preference for remedies which are designed to be self-executing, and which impose clear obligations that do not require close or ongoing monitoring.

59. However, the ACCC always approaches its assessment of a potential remedy on a case by case basis.

60. The two sections that follow discuss these issues in the context of divestment remedies and behavioural remedies.

5.2 Challenges associated with divestment remedies

61. Divestment remedies are typically simpler to consider than behavioural remedies. Nonetheless, divestment remedies can still raise difficulties. Often it will not be obvious whether a proposed divestment will address all competition concerns associated with the merger. For example, if the acquirer has only offered to sell part of their existing business, it may be difficult to assess whether that partial divestiture is of a sufficient size to address concerns associated with horizontal aggregation.

62. Divestment remedies can also raise implementation problems. For example, a party may offer a divestment remedy that appears to completely address the ACCC's competition concerns by offering to divest all products or business units of the target that overlap with the acquirer's operations. Nonetheless, the ACCC will still need to be satisfied that the business units or products being divested are capable of being severed from the rest of the acquirer's business and operated as an effective competitor in the market (either on a stand-alone basis, or as part of another company). The divestment assets must have integrity as a stand-alone business. Similarly, the ACCC will need to be satisfied that a suitable purchaser can be found to run the divestment business.

63. Some of the challenges associated with assessing a partial divestiture are illustrated by the earlier discussion of the ACCC's review of Iron Mountain's proposed acquisition of Recall, see paragraph 0 above for further details.

5.3 Challenges associated with behavioural remedies

64. Behavioural remedies that attempt to resolve issues around vertical relationships present particular challenges in drafting, monitoring and enforcing an appropriate obligation.

65. For example, the ACCC has recently considered a number of acquisitions of critical infrastructure (such as industrial railways or ports), where the acquirer is also a downstream competitor making use of that infrastructure. These reviews have raised concerns that the acquirer may have the ability and incentive to engage in anti-competitive foreclosure strategies, such as limiting its downstream rivals' ability to access the infrastructure, or only providing access at excessively high prices. Parties have attempted to address these concerns by offering remedies that would require the purchaser to provide access to the infrastructure to all parties on a non-discriminatory basis.

66. To be capable of effective implementation, a remedy must be sufficiently clear about how it will operate, sufficiently flexible for changing circumstances, and rigorous enough to prevent loopholes. There is tension between each of these factors.

67. In particular, in the case of a behavioural remedy that attempts to mitigate concerns about vertical integration:

- There is significant difficulty in anticipating all possible forms of discrimination strategies that a vertically integrated operator could engage in, particularly given the often long term nature of these remedies.

- Behaviour that is discriminatory may be disguised as commercially reasonable (e.g. establishing a safety protocol that only the related entity can satisfy), or behaviour that is commercially reasonable may be prevented as it appears discriminatory (e.g. restricting access to only one company may be the most efficient way of operating the asset). If those situations cannot be clearly differentiated, there is a risk that discriminatory behaviour can be disguised as non-discriminatory commercial behaviour, or, alternatively, there is a risk that behavioural remedies may prevent the merged firm from engaging in efficient business activities.

- If the obligations try to address all forms of current and potential anti-competitive behaviour and all possible future circumstances, they are less likely to frame the obligations in a manner that is clear and unambiguous and therefore may be unenforceable.

- Where a behavioural obligation is contrary to the commercial interests of the party giving the undertaking, that party has an incentive to circumvent its obligations. These actions may undermine the objectives of a remedy, even if they do not necessarily constitute a breach of the remedy.

68. Given these challenges in specifying, monitoring and enforcing behavioural remedies, the ACCC is less likely to accept them as the primary means to address competition harm.

5.4 The appropriate use of merger remedies in the case of government privatisations of monopoly assets

69. The ACCC has recently publicly commented on the appropriate role of merger remedies in situations where governments are privatising a monopoly asset, and the limits of merger remedies in these scenarios.

70. In particular the ACCC has taken issue with the practice by some governments (state or federal) of seeking to privatise monopoly assets without establishing appropriate access mechanisms prior to the sale, instead relying on contractual arrangements with the new owner.

71. Where the sale would otherwise be likely to result in vertical integration that would be likely to substantially lessen competition in breach of the Act, the ACCC considers that it may be able to some extent to accept remedies to deal with access issues.

72. However, in accepting a remedy the ACCC does not seek to improve competition beyond the pre-merger level of competition. Nor will the ACCC seek a remedy to deal with issues that are not related to the proposed acquisition. Accordingly, where privatisation represents a bare transfer of the monopoly asset from the government to the private sector, the sale is unlikely to lead to a substantial lessening of competition in a market, and the ACCC considers that merger remedies would not therefore be available.

73. The ACCC is of the view that these limitations upon the appropriate role of merger remedies are not always well understood and that this has created difficulties where there is an expectation that an ACCC review of the acquisition can consider all relevant competition and access issues, and determine all relevant merger remedies. Whereas in reality:

- Merger remedies seek to remedy the competition issues likely to result from the merger; they cannot address competition issues arising from the monopoly characteristics of the infrastructure that exist regardless of ownership.
- Merger remedies may not represent the most effective mechanism for ensuring appropriate terms and conditions of access to monopoly infrastructure. Long term behavioural merger remedies necessarily involve various risks relating to their effectiveness. In contrast, legislative or more formal regulatory access regimes allows proposed arrangements to be effectively reviewed, amended or renewed as required.
- A merger review is unlikely to be the best mechanism for considering access issues. The compressed timeline under which merger reviews are conducted may not provide a sufficient period to work through all the relevant issues.

74. In light of these concerns, the ACCC has done a lot of public advocacy to explain its position. This has included discussions with state and federal governments to ensure that an appropriate regulatory framework is created before the asset is sold.

6. Has your agency's approach to accepting and/or rejecting remedies been tested in the courts? If yes, please describe the main points of the court's decision which upholds or rejects the agency's i) prohibition decision, ii) decision to clear the merger subject to remedies, and/or (iii) the agency's approach or analysis of proposed remedies.

75. Under the most commonly used merger control process in Australia (the 'informal review' process), as described above the ACCC does not make binding decisions about mergers. Instead, at the end of its review, the ACCC provides merger parties with its view as to whether a proposed acquisition would contravene s. 50 of the Act.

76. If at the conclusion of an informal review the ACCC forms the view that a merger proposal would be likely to substantially lessen competition (and that any offered remedies would be insufficient to address the competition issues), and the parties nonetheless decide they wish to proceed with the acquisition:

- The ACCC must decide whether to apply to the Federal Court of Australia for an injunction to prevent the merger from proceeding or for an order of divestiture if the acquisition has already completed and other orders, such as a declaration that the acquisition is void (which requires the vendor to refund the monies paid) and penalties. In this case, the onus would be on the ACCC to establish that the acquisition contravened s. 50 of the Act.

- The parties may seek a declaration from the Federal Court that a merger would not contravene s. 50 of the Act.

- The parties may apply to the Tribunal for authorisation which, if granted, provides statutory protection for a merger. The Tribunal does not consider the same statutory test as the ACCC; instead the Tribunal considers whether a merger would lead to such a benefit to the public that it should be allowed to occur.

77. In these circumstances, the Federal Court or the Tribunal (as applicable) considers the merger proposal afresh, without regard to any previous views that the ACCC may have reached during the informal review process (such views being without legal force). Accordingly, while the Federal Court or Tribunal may be required to make a decision on the same merger proposal that was considered by the ACCC during an informal review, strictly speaking, these decisions are not reviews of an ACCC decision.

78. Cases about the application of s. 50 are rare. There are no recent s. 50 cases in which the ACCC's approach to accepting or rejecting merger remedies has been the primary issue.

79. The Tribunal is a quasi-judicial body, it consists of a three person panel made up of a judge and two lay members with specialist expertise in economics and/or business. If parties apply to the Tribunal for merger authorisation, the ACCC is required to assist the Tribunal in its consideration of the proposed acquisition. This assistance includes the ACCC making submissions and leading evidence on the likely benefits and detriments of the proposed acquisition. However, the decision on whether to authorise the merger remains with the Tribunal.

80. As the merger authorisation process is independent of the ACCC's informal and formal review processes and is subject to a different statutory test, parties may also apply for merger authorisation after the ACCC has opposed a merger either informally or formally.

6.1 The Australian Competition Tribunal's authorisation of Sea Swift's proposed acquisition of Toll Marine Logistics

81. As described earlier in this paper, in July 2015 the ACCC decided to oppose Sea Swift's proposed acquisition of Toll Marine. Sea Swift subsequently applied to the Tribunal for authorisation of the proposed acquisition. Sea Swift offered remedies to the Tribunal as part of its application that were similar to those remedies offered to the ACCC during its merger review.

82. After considering the evidence, including oral testimony in a hearing and cross examination of witnesses, the Tribunal granted conditional authorisation to Sea Swift's proposed acquisition of Toll Marine, determining that it was satisfied that the acquisition, when considered together with the remedies proposed by Sea Swift and Toll Marine, would lead to such a benefit that it should be allowed to occur.

83. On competitive detriment, the Tribunal was satisfied that save for the competitive detriment addressed by the Gove lease undertaking (an access remedy), there was no competitive detriment with the proposed acquisition that would not exist without it. It reached this position primarily on the basis that, if the Tribunal refused authorisation:

- Toll Marine would wind up its business and exit the Northern Territory and far north Queensland markets within approximately 60 days.

- As no potential entrant had taken concrete steps to be in a position to contest contracts within 60 days, Sea Swift would become the service provider to Toll Marine's five largest customers which provide the base load volumes which make the scheduled service routes viable.

- The future "without" the proposed acquisition would therefore not result in a unique opportunity for new entry. Rather, in the absence of the proposed acquisition, Sea Swift would hold the base load contracts in the Northern Territory and far north Queensland without any restriction on the prices it might negotiate with contracted customers, the regularity of the scheduled services it might provide to remote communities, or the prices it might charge uncontracted customers.

84. The Tribunal concluded that the remedies proposed by the parties would confer public benefits that would not be available if the proposed acquisition was not authorised. The paragraphs that follow provide a brief explanation of each of those proposed remedies, and the Tribunal's conclusion on the extent of benefits associated with each remedy.

85. The Transferred Contracts Condition relates to contracts between Toll Marine and its customers for the supply of freight services that Sea Swift would acquire as part of the proposed acquisition. The condition prohibits Sea Swift from relying on any provisions relating to exclusivity, minimum volume requirements or rights of first refusal in those contracts. The Tribunal considered that this condition would be pro-competitive because it would give Sea Swift's competitors the opportunity to compete for those contracts at any time during their term and addressed Sea Swift's entrenchment as the provider to Toll Marine's major customers. The Tribunal also found a public benefit in that existing price and other terms in transferred contracts (that were negotiated during the price war) would be preserved and flow through to socially and economically disadvantaged communities.

86. The Remote Communities Service Condition requires Sea Swift, for a period of five years after the completion of the proposed acquisition, to maintain a minimum level of scheduled services to 38 remote locations currently serviced by Sea Swift or Toll Marine. The Tribunal considered that this assurance was durable and substantive and of value to disadvantaged remote communities.

87. The Remote Communities Price Condition also applies for a period of five years from the completion of the proposed acquisition. It imposes limitations on Sea Swift's capacity to increase prices for dry freight, refrigerated freight and vehicle freight, the most common types of freight shipped by uncontracted customers. The Tribunal determined that on a stand-alone basis, this condition might not confer a benefit sufficient to justify the grant of authorisation but as part of a package of conditions (remedies) it should be taken into account.

88. The Tribunal considered that the Remote Communities Price Condition and the Remote Communities Service Condition would result in a public benefit in assuring that remote communities would continue to receive regular scheduled services, with capped prices, for a period of five years.

89. The Gove Lease Undertaking related to concerns about competitors obtaining access to the critically important regional wharf at Gove following the proposed acquisition. The Tribunal formed the view that in the absence of the Gove Lease Undertaking, a competitive detriment would result from the proposed acquisition as Sea Swift would have exclusive control of the roll-on/roll-off ramp which is the most efficient facility at Gove for scheduled service operations. The Gove Lease Undertaking requires Sea Swift to provide access to the Gove wharf on a non-discriminatory basis at specified prices. The Tribunal found that the Gove Lease Undertaking would confer a benefit by providing for lower access prices than those charged by Toll Marine and the extension of an existing undertaking to the most useful facility for marine freight operators at Gove.

90. The ACCC led evidence that the Gove Lease Undertaking could provide only an imperfect constraint on Sea Swift's behaviour post acquisition, and that even if this remedy was accepted by the Tribunal, Sea Swift would retain the incentive and ability to discriminate against its competitors who use the facility. However, the Tribunal considered potential non-compliance with the terms of the remedy to be an issue that should form the basis of enforcement action by the ACCC if it occurs.

91. The ACCC is considering how it might more effectively articulate its concerns about merger remedies in future cases considered by the Tribunal. This matter also highlights the challenges when remedies are accepted by a decision maker that is not responsible for enforcing those remedies.

7. To what extent does your agency consider the opinion of third parties/public in i) deciding whether to prohibit a merger, and ii) designing and implementing remedies? In your reply, please specify the role of market testing in your process. What is, in your view and experience, an effective market test and which lessons have been learnt over time to improve market testing? What other tools have you used to consider opinions of stakeholders in your analysis of remedy effectiveness?

92. Subject to a proposed remedy meeting certain minimum thresholds, the ACCC uses public consultation to test the likely effectiveness of a remedy with those parties that are most likely to be affected by the proposed acquisition. The feedback received during this process is:

- provided to the merger parties, to give them the opportunity to revise their proposed remedy, should they wish to do so
- used to inform the ACCC's final decision about the proposed acquisition (together with all other relevant material).

93. An effective market consultation will be both broad (in that it captures views of a broad cross-section of potentially affected parties) and detailed (in that it allows the ACCC to explore specific issues of interest in relation to the proposed remedy). However, the extent of consultation required in any given review will vary based on:

- the magnitude of the proposed acquisition
- the ACCC's familiarity with the affected markets.

94. For example, in a recent review that potentially impacted on a broad range of retailers, the ACCC contacted over 1 000 industry participants to gather information and gain their views about the proposed acquisition and the proposed remedy. The contact with individual participants ranged from general comments about the likely effect of the acquisition through to detailed conversations about the drafting of aspects of the remedy. As a result of conducting such a broad market consultation process, the ACCC felt confident that it had considered the full range of diverse views within the industry about this acquisition and the proposed remedy.

95. However, there can also be drawbacks to extensive consultation with third parties. These drawbacks include the time it takes to fully consult, and the risk of creating ‘feedback fatigue’ amongst potential respondents. For these reasons, the ACCC will often engage in a more selective market consultation exercise in reviews of remedies in which the group of potentially affected parties is less diffuse.

8. In your experience, what mechanisms minimise the risk of ineffective implementation of remedies? In your reply, please specify the role of divestiture/hold separate/monitoring trustees in your process.

96. Almost all remedies accepted by the ACCC make use of an independent auditor. The auditor, who is typically a lawyer or an accountant, is required to provide reports to the ACCC at regular intervals about compliance with the remedy. The firm that offers the remedy will nominate and compensate the auditor, but the ACCC must approve the identity of the auditor before they commence work.

97. All divestiture remedies accepted by the ACCC contain mechanisms to ensure that the business that is being sold is maintained as an independent competitor until the sale is completed.

98. In many cases, the divestiture (either of part of the acquirer’s business, or part of the target’s business), can occur after the control date for the main transaction. In these circumstances:

- The ACCC requires that an independent manager (whose identity is approved by the ACCC) run the business to be divested for the period from the control date of the main transaction until the divestiture has been completed. The role of the independent manager is to run the company or business unit that is to be divested at arms-length from its current owners so as to maintain the capabilities of the divestiture business until a buyer has been found.

- The ACCC allows the vendor of the divestiture business an initial sale period in which to conduct its own sale process for the divestiture business. The length of this period varies from case to case depending on the circumstances, and is always confidential.

- If the vendor fails to find a buyer that is acceptable to the ACCC within the initial sale period, control of the sale process is passed to an independent divestiture agent whose mandate is to sell the business as soon as possible at no minimum price. The primary benefit of this requirement (known as the fire sale provision) is to provide a significant incentive for the vendor of the divestiture business to find an acceptable purchaser within the agreed period. To date, the ACCC has not had to appoint an independent divestiture agent to sell a divestiture business.

99. While mechanisms of this kind can mitigate the risk that a divestiture remedy will not be effectively implemented, they cannot eliminate the risks entirely. This means that there is always a careful decision for the ACCC to make when it is deciding whether to allow a divestiture remedy that allows for the sale to occur after the main transaction is completed.

100. If the ACCC decides to accept a remedy where the divestiture occurs after the main transaction has completed, the ACCC is implicitly engaging in a trade-off; and has judged that in those particular circumstances the risks associated with the divestment remedy are sufficiently small and manageable, and that the remedy otherwise comprehensively addresses the competition harms.

101. However, in other circumstances, the ACCC may decide that the risks associated with a post-completion divestiture are too great. For example, it may not be confident that a proposed divestiture business could be maintained as an effective independent competitor while a new buyer is found. In these cases, the ACCC would require that any divestiture occur before the main transaction is completed.

9. Conclusion

102. The ACCC considers each remedy before it on a case by case basis. Its consideration combines the ACCC's accumulated experience with market feedback about the proposed acquisition and the proposed remedy. When it makes a final decision, the ACCC considers the remedy and the acquisition together. It considers whether the proposed acquisition, in conjunction with the offered remedy, would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia.

103. There are risks in accepting any remedy. First and foremost, there is always a chance that the remedy will not be as effective as the ACCC expects. As a result, there is a relationship between the strength of the ACCC's concerns and its willingness to accept a remedy. The stronger the ACCC's competition concerns, the more satisfied it needs to be about the ability of the remedy to address those concerns, and about the ability of the remedy to be practically implemented. This paper has provided examples of situations in which the ACCC's concerns were so strong that no remedy was capable of addressing them.